KWAN HUNG CHEONG A

v.

INSPEKTOR YUSOF HJ OTHMAN & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN B
YEW JEN KIE JC
[CAS21-02-2001]
24 OCTOBER 2008

CIVIL PROCEDURE: *Action - Disposal of action without trial - Determination of questions of law - Police's use of police bail bond against suspect - Whether an abuse of power - Whether constitutes deprivation of suspect's personal liberty - Remedy - Rules of the High Court 1980, O. 14A - Penal Code, s. 454 - Criminal Procedure Code, ss. 388, 390, Form 3 of Second Schedule - Federal Constitution, art. 5(1)* C D

CRIMINAL PROCEDURE: *Bail bond - Lawfulness of - Police's use of police bail bond against suspect - Whether an abuse of power - Whether constitutes deprivation of suspect's personal liberty - Remedy - Rules of the High Court 1980, O. 14A - Penal Code, s. 454 - Criminal Procedure Code, ss. 388, 390, Form 3 of Second Schedule - Federal Constitution, art. 5(1)* E

CONSTITUTIONAL LAW: *Fundamental liberties - Deprivation - Police's use of police bail bond against suspect - Whether an abuse of power - Whether constitutes deprivation of suspect's personal liberty – Remedy - Rules of the High Court 1980, O. 14A - Penal Code, s. 454 - Criminal Procedure Code, ss. 388, 390, Form 3 of Second Schedule - Federal Constitution, art. 5(1)* F

In this application by way of originating summons under O. 14A G of the Rules of the High Court 1980, the plaintiff applied for the agreed issues for trial to be disposed of by determining the following questions of law: (i) whether it is lawful for the police to issue a police bail bond against a suspect who has been released by an order of the court after remand under s. 117 of the H Criminal Procedure Code ('CPC'); (ii) whether it is lawful for the police bail bond to impose a condition that the suspect has to appear and report to the police at a police station on a fixed date, and which condition is then extended for an indefinite period for so long as the case against the suspect is still under police I investigation; and (iii) if either or both the use of the police bail bond described above is or are unlawful, whether the misuse

A constitutes a deprivation of the suspect's personal liberty in breach of art. 5(1) of the Federal Constitution ('FC') giving rise to remedy or relief.

On 3 January 2000, the plaintiff and one Mr Lai were arrested
B without warrants on suspicion of committing an offence under s. 454 of the Penal Code ('PC') and brought before the magistrate at Sandakan within 24 hours, who ordered them to be remanded three days for further investigation. On 6 January 2000, the prosecuting officer applied to the magistrate for an order to
C release the plaintiff and Mr Lai on police bail pending completion of the police investigation, which application was granted. The plaintiff, however, was required to appear before the Sandakan police station on 28 January 2000, when the 1st defendant endorsed the bail form and extended bail until 28 February 2000
D in his capacity as the investigating officer. This process was repeated at monthly intervals right through to 5 October 2000. In the interim period, the plaintiff wrote numerous letters to the Federal Attorney General's Chambers enquiring about the decision concerning the complaint against him. On 11 October 2000, they
E finally wrote to inform the plaintiff that they had decided to close the investigation and to withdraw the police bail against him. The plaintiff's case in the present instance was that the 1st to 5th defendants' use of the police bail bond against him was an abuse of power, rendering their actions unlawful, illegal and a breach of
F his constitutionally-guaranteed liberty.

Held (allowing the plaintiff's claim):

(1) The relevant provision for consideration was s. 388 of the CPC as the plaintiff was accused of committing an offence
G under s. 454 of the PC, which is categorised as a non-bailable offence. The 1st defendant could not have relied on s. 388(2) of the CPC to issue the police bail bond for the following reasons. Pursuant to s. 388 of the CPC, if it appears to the officer in charge of the police district at any stage of the
H investigation that there are no reasonable grounds for believing that the accused person has committed a non-bailable offence but there are further grounds for further inquiry into his guilt, such officer may release the accused person on bail pending such inquiry. However, the notes of proceedings did not show
I that the prosecuting officer had applied for the police bail on that basis. The records showed that he applied for the release

of the plaintiff and Mr. Lai on the police bail pending completion of the police investigation. The notes of the proceedings clearly showed that the magistrate had not imposed any conditions in ordering the release of the plaintiff and Mr Lai. If there were any conditions attached to the release they would have been clearly stated in the order, and there were none. Therefore, the answer to the first question was in the negative. (paras 13, 14, 21, 22, 23, 24 & 25)

(2) If an accused person has been admitted on bail either by the police or the court, s. 390 of the CPC allows the court or the police to impose conditions on him, including appearing before the police officer. In this case, however, the magistrate did not admit the plaintiff to bail but released him unconditionally, so the question whether the magistrate was competent to order the accused to appear before the police when needed to complete the investigation did not arise. The defendants could not rely on s. 390 of the CPC to justify the imposition of the condition requiring the plaintiff to appear or present himself at the police station. The reliance on Form 3 of the Second Schedule of the CPC must also fail as the terms of the police bail bond showed that it was not similarly worded as Form 3. Furthermore, Form 3 is in respect of bonds and bail bonds after arrest under a warrant whereas the plaintiff was arrested without a warrant. Form 3 also does not state that the plaintiff was required to appear or present himself at the police station. The police bail bond showed that the plaintiff was required to appear before the Magistrates' Court to answer the charge, which was contrary to the condition of requiring the plaintiff to report to the police at the police station. In the absence of an order by the magistrate requiring the plaintiff to report to the police station, the second question should be answered in the negative. (paras 29, 30, 31, 32 & 33))

(3) It is clear that personal liberty is liberty relating to the person or the body of the individual and the negative right of not being subjected to any form of restraint or coercion. It was, therefore, the considered opinion of this court that the unlawful police bail issued by the 1st defendant against the plaintiff had subjected him to a form of restraint or coercion resulting in the deprivation of personal liberty in breach of art. 5(1) of the FC. On the issue of remedy, the maxim of *ubi*

A *jus ibi remedium*, namely, wherever there is a right there must be a remedy came to mind. As the right to personal liberty is such a constitutional right, a breach of that right must give rise to a suitable remedy or relief to enforce such constitutional right. Therefore, the answer to the third
B question was in the affirmative. *Majlis Perbandaran Pulau v. Syed Ahmed MM Gouse Mohamed* (foll). (paras 40, 41, 42, 43, 44, 45 & 46)

Case(s) referred to:

C *Bird v. Jones [1845] QB 742* ***(refd)***
Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors [1985] 1 CLJ 229; [1985] CLJ (Rep) 59 ***(refd)***
Dasthigeer Mohamed Ismail v. Kerajaan Malaysia & Anor [1999] 6 CLJ 317 HC ***(refd)***
Government of Malaysia & Ors v. Loh Wai Kong [1979] 1 LNS 22 ***(refd)***
D *Gulam Mohammad Azimuddin v. State, AIR [1959] MP 147* ***(refd)***
Kimat Rai Sanwal Singh Khushalani Accused – Petitioner v. Emperor AIR (32) [1945] Lahore 215 ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syed Ahmed MM Gouse Mohamed [2007] 1 CLJ 547 CA ***(foll)***
E *Michael Raymond Taylor v. PP [1989] 2 CLJ 539; [1989] 2 CLJ (Rep) 1031 HC* ***(refd)***
Mohammad Ali v. Ram Swarup AIR [1965] Allahabab 161 ***(refd)***
Syed Mohamad Yusuf-Ud-Din v. Secretary of State of Indian [1903] 19 TLR 496 ***(refd)***
Wales v. Whitney [1885] 114 US 564 ***(refd)***
F *Zahir Ahmad v. Ganga AIR [1963] Allahabab 4* ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 28, 29, 117, 387, 388(1), (2), 390
Federal Constitution, art. 5(1)
Penal Code, s. 454
G Rules of the High Court 1980, O. 14A

Constitution of India [Ind], art. 21
Criminal Procedure Code [Ind], s. 59
Criminal Procedure Code [Sing], s. 351

H **Other source(s) referred to:**
Sohoni's Code of Criminal Procedure, 1992 edn, p 302

For the plaintiff - Dr David Fung Yin Kee; M/s Alex Pang & Co
For the defendants - Eyu Ghiam Siang DPP

I *Reported by Suresh Nathan*

JUDGMENT

Yew Jen Kie JC:

[1] In this case the plaintiff put in a summons in chambers (SIC) under O. 14A of the Rules of High Court 1980 pursuant to the order of the court consented to by both parties, given on 3 September 2007, to proceed with this action under O. 14A.

[2] In this SIC, the plaintiff is applying for the following orders (as per the SIC):

(1) That Items 1 and 2 of the Agreed Issues for Trial (Enclosure 116) would be disposed of by determining the questions of law framed as follows:

(a) Is it lawful for the police to issue a police bail bond against the suspect who has been released by an order of the Court after remand under section 117 of the Criminal Procedure Code?

(b) Is it lawful for the police bail bond to impose a condition that the suspect has to appear and report to the Police at a police station on a fixed date and which condition is then extended for an indefinite period for so long as the case against the suspect is still under police investigation?

(c) If either or both of the use of the police bail bond described above is or are unlawful, does the misuse constitute a deprivation of the suspect's personal liberty in breach of Article 5(1) of the Malaysia Federal Constitution giving rise to remedy or relief?

(2) The above questions of law will be determined in reliance on the following documents already filed with the Court, namely:

Agreed Issues for Trial (Enclosures 116);

Statement of Agreed Facts (Enclosures 117);

Agreed Bundle of Documents (Enclosures 118);

Bundle of Pleadings (Enclosures 119);

Agreed and Admitted Bundle of Documents (Enclosures 120) and;

Plaintiff's Bundle of Documents (Enclosures 121).

[3] The background facts leading to the present application are as follows:

a) On 3 January 2000, the plaintiff and one Mr Lai were arrested without warrant on suspicion of committing an offence of house-trespass or house-breaking under s. 454 of the Penal Code based on a complaint lodged with the police station at Sandakan by one All Latip Taha (the tenant of the plaintiff). They were brought before the Magistrate at Sandakan within 24 hours. On 4 January 2000, upon the 1st defendant's application the Magistrate ordered that the plaintiff and Mr Lai be remanded three days for further investigation.

b) On 6 January 2000, the prosecuting officer Chief Inspector Choo Peng Yeang applied to the Magistrate for an order to release the plaintiff and Mr Lai on police bail pending completion of police investigation. The Magistrate Puan Grace Puntang ordered that both the plaintiff and Mr Lai be released. This is what the learned Magistrate wrote in the notes of proceeding (p. 5 of encl. 118).

Both suspect to be released

c) Immediately after the release, however, the 1st defendant made the plaintiff and Mr Lai sign separate police bait bond issued by the 1st defendant for an undeposited sum of RM10,000 in two sureties.

d) The plaintiff had to appear before the 1st defendant at the Sandakan police station on 28 January 2000 when the 1st defendant endorsed the bail form and extended bail until 28 February 2000 in his capacity as the investigating officer. On 28 February 2000, the plaintiff appeared at the Sandakan police station when the 1st defendant endorsed the bail form and extended bail until 28 March 2000. The process was repeated at about monthly intervals right through to 5 October 2000.

e) In the interim period the plaintiff wrote to the Federal Attorney General's Chambers to enquire about the decision concerning the complaint against him, emphasizing that the whole matter was still hanging over him and that he had to report to the Sandakan police station each month. The first

letter was written on 11 May 2000 (p. 3-6 encls. 120) followed by letters of reminder dated 26 June 2000, 15 July 2000 and 1 September 2000 (pp. 7-11 encls. 120) respectively.

f) On 11 October 2000, the Federal Attorney General's Chambers finally wrote to inform the plaintiff that after careful and comprehensive study of the case, they have decided to close investigation and to withdraw the police bail against him (p. 13 of encls. 120)

g) It is the case for the plaintiff that the 1st to 5th defendants' use of the police bail bond against him is an abuse of the powers entrusted to them under the empowering statute, the Criminal Procedure Code, for the defendants had acted without or beyond their powers rendering their action unlawful or illegal. Such unlawful action is invalid, null and void. It is also in breach of the person's constitutionally guaranteed liberty under art. 5(1) of the Federal Constitution resulting in appropriate relief to the plaintiff.

Question 1: Is it lawful for the police to issue a police bail bond against a suspect who has been released by an order of the court after remand under s. 117 of CPC?

[4] Learned Federal Counsel for the defendants submits that there is no clear provision under the law as to when the police bail can be imposed on an accused person or a suspect. There are several provisions in the Criminal Procedure Code, namely, ss. 28, 29, 387 and 388, which empower the police to release an accused person under police bail bond, and the issuance of the police bail bond herein is in accordance with the provisions of the law.

[5] It is next contended that there is no restriction in the law on the police officer to issue police bail after an accused person has been released by the court after remand order has expired. Under subsection (2) of s. 388 of Criminal Procedure Code, the requirements for an accused to be released on bail are as follows:

a) at any stage of the investigation;

b) but there are sufficient grounds for further inquiry into his guilt;

A c) the accused shall, pending such inquiry, be released on bail;

d) at the discretion of that officer or court.

[6] Learned Federal Counsel also submits that s. 29 ought to be read on its own, citing *Dasthigeer Mohamed Ismail v. Kerajaan* B *Malaysia & Anor* [1999] 6 CLJ 317 as support.

[7] With respect, I do not agree that s. 29 can stand on its own. The plain wordings in the section make it very clear that the provision only provides for the release of the persons arrested. It C reads:

> No person who has been arrested by a police officer shall be released except on his own bond or on bail or under the order in writing of a Magistrate or of a police officer not below the rank of Inspector.

D

[8] Section 29 not being an empowering provision which confers power on the police or the court to release the persons arrested, the court or the police cannot rely on it to make order to release the person arrested either on bond, or on bail or to make order E of the court. The section must be read together with other provisions which give power to the police to release the person arrested on bond or bail or the court to make an order.

[9] This is the view adopted in *Gulam Mohammad Azimuddin v.* F *State*, AIR [1959] MP 147 at 149 referred to in *Sohoni's Code of Criminal Procedure* 1992 edition p 302, which held, in respect of s. 59 Indian Criminal Procedure Code (the equivalent to s 29 of the Malaysian Criminal Procedure), as follows:

> G This section as it is worded does not itself confer any power on any Magistrate to release a person on bail. It only provides for the release of a person arrested without warrant on his bond or on bail or on his discharge under the special order of a Magistrate. The release is to be only when under other provisions of the Code a person has been ordered to be released on his H bond or on bail or on his discharge under the special order of a Magistrate.

[10] For the reason stated above, it is clear that the police bail bond could not have been issued pursuant to s. 29 of the Criminal Procedure Code.

I

[11] Section 28 is the provision on how a person arrested without warrant is to be dealt with. Simply put, this section says that a police officer making an arrest shall without unnecessary delay and subject to the provisions herein as to bail, release take or send the person arrested before a Magistrate's Court within twenty four hours.

[12] In my opinion, the relevant provisions on bail are found in ss. 387 and 388 of the Criminal Procedure Code. Section 387 provides for the release on bail of person accused of a bailable offence. Whereas s. 388 deals with granting of bail in non-bailable cases.

[13] The relevant provision for consideration is s. 388 as the plaintiff was accused of committing an offence under s. 454 of the Penal Code, which is categorized as a non-bailable offence.

[14] Section 388 states:

> (i) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by such Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or (imprisonment) for life;
>
> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.
>
> (ii) If it appears to such officer or Court at any state of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds, for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry in his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided
>
> (iii) …

[15] In *Michael Raymond Taylor v. PP* [1989] 2 CLJ 539; [1989] 2 CLJ (Rep) 1031, Chua J approved the magistrate's construction of the use of the disjunctive word 'or' in s. 351 of the Singapore Criminal Procedure Code (the equivalent to s. 387 of our

Malaysian Criminal Procedure Code), namely, that each limb must be read disjunctively so that the provision must be read as referring to a situation where a person is arrested without warrant or is detained, or a person who is served with a summons and in obedience thereto, 'appears' in court. He may also 'appear' in court after he has been arrested, where subsequently he is released on bail by the police, or a person is produced before the court to answer the charge.

[16] This case applies equally in Malaysia not only in the context of bailable offences, but also non-bailable offences because s. 388(1) which provides for non-bailable offences uses the same words.

[17] Section 388(1) clearly confers power upon the police to release any person accused of non-bailable offences on bail, which power, in my opinion, is exercisable before the accused is produced or brought before a court under s. 117 of the Criminal Procedure Code.

[18] In the present case, the 1st defendant did not exercise this power instead he produced the plaintiff and Mr Lai before the Magistrate's Court pursuant to s. 117 of the Criminal Procedure Code.

[19] Section 117 envisages a situation in which the investigation of the offence, for which the accused is arrested, cannot be completed within twenty-four hours after the arrest. In this situation the police officer making the investigation shall forthwith produce the accused before a Magistrate who, upon finding that there are grounds for believing that the accusation or information is well founded, may from time to time authorize detention of the accused for a term not exceeding fifteen days in the whole.

[20] As stated earlier, the learned Magistrate was satisfied that the accusation against the plaintiff and Mr Lai was well founded and she duly ordered them to be remanded three days. On the day the remand expired the learned Magistrate did not entertain the application by Chief Inspector Choo Peng Yeang for them to be released on a police bail pending completion of investigation of the case and she ordered them to be released without imposing any condition.

[21] In my opinion, the 1st defendant could not have relied on s. 388(2) of the Criminal Procedure Code to issue the police bail bond. My reasons for saying so are as follows: Pursuant to s. 388, if it appears to the officer in charge of the police district at any stage of the investigation that there are not reasonable grounds for believing that the accused person has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, such officer may release the accused person on bail pending such inquiry.

[22] A perusal of the notes of proceedings (p. 5 encls. 118) does not show that the prosecuting officer had applied for the police bail on the ground that there were no reasonable grounds for believing that the accused had committed a non-bailable offence, but there were sufficient grounds for further inquiry into his guilt. The records show that he applied for release of the accused and Mr Lai on the police bail pending completion of police investigation.

[23] The learned Federal Counsel submits that the notes of proceedings (p. 5 of encl. 118) does not indicate that the learned Magistrate at the material time had denied Chief Inspector Choo Peng Yeang's application for the plaintiff and Mr Lai to be released on police bail. There is also no indication that counsel acting for the plaintiff or Mr Lai had objected to the application by Chief Inspector Choo Peng Yeang. It also does not show that the learned Magistrate had said that the police could not carry out further investigation against the plaintiff or that the investigation should stop after the plaintiff has been released.

[24] It must be borne in mind that both the parties have agreed and are legally bound to have this case determined by way of O. 14A application. For the purpose of the determination of the questions framed, the court shall only rely on the notes of proceeding which clearly shows that the learned Magistrate in ordering the release of the plaintiff and Mr Lai had not imposed any conditions. To my mind, if there were any conditions attached to the release it would have been clearly stated in the order, and there was none.

[25] Having carefully perused the notes of proceeding and considered the relevant provisions, my answer to the first question herein is in the negative.

A **Question Two:** Is it lawful, for the police bail bond to impose a condition that the suspect has to appear and report to the police at a police station on a fixed date and which condition is then extended for an indefinite period for so long as the case against the suspect is still under police investigation?

B

[26] Learned Federal Counsel submits that s. 390 of the Criminal Procedure Code gives the police the power to impose condition on the accused to be present at the time and place stated in the bond. There is no provisions under the law that it is unlawful to C impose condition on the accused to appear or present at the police station on a fixed date at intervals.

[27] Further, submits the learned Federal Counsel, pursuant to Form 3 of the Second Schedule of Criminal Procedure Code, the accused must be present "to answer to the said charge, and to D continue so to attend until otherwise directed by the court ..." It is lawful for the 1st defendant to request the plaintiff to be present at the police station instead of the Magistrate since there is no provision in law which renders it unlawful for accused to be present at police station. E

[28] Reliance is placed on the Indian case of *Kimat Rai Sanwal Singh Khushalani Accused – Petitioner v. Emperor* AIR (32) [1945] Lahore 215 where it was held:

F > Hence the Magistrate admitting an accused person to bail before the completion of the investigation is competent to require him to appear before the police when needed.
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> And, further on at page 216:
>
G > Section 499 of the Code provides that before any person is released on bail, a bond ... it is, therefore, clear that if an accused person is admitted to bail by an officer in charge of police station, the officer can require him to execute a bond with one sureties binding him to appear before himself.

H **[29]** If an accused person has been admitted on bail either by the police or the court, I would agree that s. 390 allows the court or the police to impose condition on the plaintiff including appearing before the police officer. In this case, however, the learned Magistrate did not admit the plaintiff to bail instead he was I released unconditionally, so the question of the magistrate is

competent to order the accused to appear before the police when needed to complete the investigation does not arise in this case. In my view, the defendants cannot rely on s. 390 to justify the imposition of the condition requiring the plaintiff to appear or present at the police station.

[30] The reliance on Form 3 of the Second Schedule must also fail for the following reasons. The terms of the police bail bond entitled "Surat Perjajian Dan Jaminan Kepada Polis Diraja" (p. 6-7 of encls. 118) issued by the 1st defendant and signed by the plaintiff and his sureties reads:

> Bahawa saya (nama) Kwan Hung Cheong ... yang tinggal di Ting 4, Sentosa Court yang telah kena tuduh dengan kesalahan 454 KK adalah dengan ini mengaku akan hadir di hadapan mahkamah Majistret di Sandakan pada pukul 0900 hrs pagi pada 28.1.00 (atau pun pada masa dan haribulan yang diberitahukan oleh Polis Diraja kepada saya) kerana menjawab tuduhan ini, jika sekiranya tiada saya hadir sebagaimana yang tersebut maka saya mengaku akan membayar kepada Kerajaan Malaysia wang sebanyak RM10,000/- ringgit. (undeposited)

[31] A perusal of the terms of the police bail bond shows that it is not similarly worded as Form 3 in the Second Schedule. Further, Form 3 is in respect of bond and bond bail after arrest under a warrant whereas the plaintiff was arrested without warrant. Further, the Form 3 does not state that the plaintiff is required to appear or present himself at the police station.

[32] A careful perusal of the police bond bail shows that the plaintiff was required to appear before the Magistrates' Court to answer the charge which is contrary to the condition of requiring the plaintiff to report to the police at the police station.

[33] In the absence of order by the learned Magistrate which required the plaintiff to report to the police station, my answer to the second question is in the negative.

Third Question: If either or both of the use of the police bail bond described above is or are unlawful, does the misuse constitute a deprivation of the suspect's personal liberty in breach of art. 5(1) of the Malaysia Federal Constitution giving rise to remedy or relief?

[34] Learned Federal Counsel submits that for the determination of whether the plaintiff had been deprived of his personal liberty in breach of art. 5(1) of the Federal Constitution required a full trial to adduce evidence of deprivation.

[35] With respect, I do not agree. In my opinion, whether or not the plaintiff has suffered personal liberty is a question of law on the meaning of that term under art. 5 of the Federal Constitution based on the facts contained in the statement of agreed facts (encls. 117), the agreed and admitted bundle of documents (as to authenticity and truth) (encls. 120) and the bail bond itself at pp. 6-7 of encls. 118).

[36] Learned Federal Counsel further submits that the issue of deprivation of personal liberty in breach of art. 5 of the Federal Constitution does not arise because the defendant had duly complied with the requirement of ss. 117 and 388 of the Criminal Procedure Code.

[37] Reliance is placed on the following cases:

Bird v. Jones [1845] QB 742 referred to in *Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors* [1985] CLJ (Rep) 59, which held that a partial restriction of freedom of movement is not imprisonment.

Wales v. Whitney [1885] 114 US 564, which held: "It is obvious that the petitioner is under no physical restraint. He walked the streets of Washington with no one to hinder his movement, just as he did before the Secretary's order was served on him."

Syed Mohamad Yusuf-Ud-Din v. Secretary of State of Indian [1903] 19 TLR 496, it was held even though a person on bail is technically in the custody of his surety, he is not "imprisoned".

[38] Article 5 of the Federal Constitution states:

> (1) No person shall be deprived of his life or personal liberty save in accordance with law.

[39] In *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 LNS 22, Tun Suffian, LP (as he then was) said:

> Article 5(1) speaks of personal liberty, not of liberty simpliciter ... In the light of this principle, in construing 'personal liberty' in article 5(1) one must look at the other clauses of this article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being 'unlawfully detained' ... It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport. ... With respect, we agree with what Mukherjee J said at page 96 in Gopalan (AIR [1950] SC 27):
>
> > In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. Accordingly to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: *vide Dicey on Constitutional Law*, Edition 9, pages 207, 208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty.

[40] It is clear that personal liberty are (1) liberty relating to the person or the body of the individual; and (2) the negative right of not being subjected to any form of restraint or coercion.

[41] On the issue whether police bond bail subjects the person of the plaintiff to a form of physical restraint or coercion, I have found the following authorities to be useful:

Zahir Ahmad v. Ganga AIR [1963] Allahabab 4 where the court in deciding the effect of a bail in the context of a *habeas corpus* application to release the accused, held:

> It is common ground that the petitioner has been bailed out and is in the custody of the bondsmen, if the expression 'custody' can be used in respect of a 'bailee' and that he is no longer in jail custody. It cannot be denied that the question under consideration is a difficult one and not free from controversy. Even if the case were to be decided on first principles, we would have been inclined to hold that the fact that a person has been granted bail does not amount to his being set at liberty. It is true that after bail is granted, he is no longer in physical custody in the sense of being in prison but it is difficult to say that he has liberty of action or even complete liberty of movement. (emphasis added)

[42] The above judgment in *Zahir Ahmad* was followed in *Mohammad Ali v. Ram Swarup* AIR [1965] Allahabab 161 at 166, where the judge took into account the period the accused was under bail as an additional period under "constructive custody" together with the period under unlawful physical custody. This was considered in the context of the deprivation of the accused's personal liberty under art. 21 of the Constitution of India which states that "no person shall be deprived of his life or personal liberty except according to procedure established by law" (the equivalent to art. 5(1) of the Malaysian Federal Constitution).

[43] In the light of the above judicial pronouncements (of persuasive value), it is my considered opinion that the unlawful police bail issued by the 1st defendant against the plaintiff has subjected him to a form of restraint or coercion resulting in deprivation of personal liberty in breach of art. 5(1) of the Federal Constitution.

[44] On the issue of remedy, the maxim of *Ubi jus ibi remedium*, namely, wherever there is a right there must be a remedy comes to mind. As the right to personal liberty is such a constitutional right, a breach of that right must give rise to a suitable remedy or relief to enforce such constitutional right.

[45] The case in support is *Majlis Perbandaran Pulau Pinang v. Syed Ahmed MM Gouse Mohamed* [2007] 1 CLJ 547, where the appellant demolished the house in which the respondent claimed an interest. The High Court held that it was wrong of the appellant to demolish the house in which the respondent was occupying without first giving him a hearing. In upholding the decision of the High Court, the Court of Appeal speaking through Gopal Sri Ram JCA identified a more fundamental basis for the remedy in the following words:

> There is another ground, a firmer ground on which the judgment of the learned judge may be upheld. This is a case where the Respondent was deprived of his property otherwise than in accordance with law, namely, the requirement of the law that he should have been given an opportunity of being heard. This is in clear violation of art 13(1) of the Federal Constitution. And it has been repeatedly held by courts across the Commonwealth that compensation is payable to a person whose constitutionally guaranteed fundamental right, such as the right of life, personal liberty or property is violated (see *Maharaj vehicle Attorney General*

of Trinidad & Tobago (No 2) [1979] AC 385; *Nilabati Bahera vehicle State of Orissa* [1993] AIR Sessions Court 1960; *Oag v. The Queen* [1985] 22 CRR 171, *Fose v. Minister of Safety and Security* [1996] 2 BCLR 232, *Simpson v. Attorney-General* [1994] 3 NZLR 667 and *Cullen v. Chief Constable of the Royal Ulster Constabulary (Northern Ireland)* [2003] 1 WLR 1763.

[46] Based on the reasons aforesaid, my answer to Question 3 is in the affirmative.

Conclusion

[47] Based on my answers to all the above Questions framed for the determination by the court in this application, I hold that the plaintiff's claim should be allowed. I therefore grant the relief as prayed for in prayers (1A) with costs against the defendants to be taxed unless agreed. I further order that damages to be assessed.